No. 80-905

In the Supreme Court of the United States

OCTOBER TERM, 1980

JORGE GOMEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DEBORAH WATSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether the warrantless entry into petitioner's apartment for the purpose of making an arrest was supported by probable cause and exigent circumstances.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 633 F. 2d 999. The opinion of the district court (Pet. App. 19a-50a) is reported at 495 F. Supp. 992.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1980. A petition for rehearing was denied on September 5, 1980. On October 24, 1980, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including December 4, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea entered in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 846.[1] He was sentenced to five years' imprisonment, followed by a special parole term of 10 years.[2] The court of appeals affirmed (Pet. App. 1a-18a).

The evidence adduced at petitioner's suppression hearing is summarized in the opinion of the court of appeals (Pet. App. 3a-7a). By mid-August 1979, the New York Drug Enforcement Task Force had learned that Irma Mejia-Londono and co-defendant Henry Serna were engaged in

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[1]Co-defendant Henry Serna pleaded guilty to possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In entering their guilty pleas, both defendants preserved their right to appeal the district court's denial of their motions to suppress certain physical evidence and post-arrest statements. See *United States* v. *Price*, 599 F. 2d 494, 496 n.1 (2d Cir. 1979); *United States* v. *Rico*, 594 F. 2d 320, 321 n.1 (2d Cir. 1979).

[2]Petitioner's special parole term is illegal under *Bifulco* v. *United States*, No. 79-5010 (June 16, 1980). Petitioner may move the district court to vacate the special parole term under Fed. R. Crim. P. 35, which provides that a court may correct an illegal sentence at any time.

narcotics trafficking and that Mejia was a major figure in the New York City cocaine trade. During the previous year and a half, the name "Irma", followed by a telephone number, had appeared in documents seized during various narcotics investigations, including that of a drug-related double homicide. The task force traced this telephone number to a New York City address listed in Serna's name. The name "Henry" also appeared on some of the documents and was followed by the same telephone number. In July 1979, narcotics agents obtained the customer list of a major drug supplier, which indicated that "Irma" had made multi-kilogram purchases of cocaine ranging up to $1,000,000 in value. An adding machine tape obtained at the same time showed that "Henry" had made a $100,000 payment on account.

On August 15, 1979, members of the task force surveilling Serna's apartment observed Serna and Mejia leave the garage of his apartment building in a car registered to Mejia. Serna drove to an area of high narcotics activity in Manhattan, parked the car, got out, and spoke to a woman for several minutes. He then drove one block west, where a man approached the car and spoke with Serna for several minutes.

After making a third stop on the Upper West Side of Manhattan, at 625 Columbus Avenue, Serna drove to a fourth location in the area, where he parked the car and made a telephone call from a corner booth. While making the call, Serna scanned the upper floors of an apartment building across the street. Serna then entered that building and returned 20 minutes later carrying a gold shopping bag. Serna and Mejia drove back to 625 Columbus Avenue, and Serna entered a restaurant at that address. He left the shopping bag in the car. Serna emerged approximately 10 minutes later, and he and Mejia drove to petitioner's apartment building in the Bronx.

At this point, the agents concluded that a drug delivery was in progress and that the drugs were inside Serna's bag. As Mejia and Serna, who was carrying the bag, entered the rear entrance of the building, the agents lost sight of them for a few moments. With the help of some other occupants of the building, who were entering at the time the agents reached the door, the agents entered the building and hurried to a stairwell, where they heard voices and the sound of a door closing on the next landing. The agents ran up the stairs to the second floor, opened the stairwell door, and heard voices and the release of a door chain coming from an apartment around the corner to the right. Rounding the corner, the agents saw Serna at the door of petitioner's apartment, with one foot inside and one foot outside the door.

The agents, who were about 15 feet from the apartment, displayed their badges and shouted "police." When he saw the agents, Serna entered the apartment and slammed the door. The agents knocked on the door and requested that it be opened. They again announced that they were police. When no one answered, one of the agents began to kick and bang on the door. From time to time, the agent put his ear to the door and heard voices, the scurrying of feet, the sound of water running through pipes, and the sound of a toilet flushing.

An agent stationed outside the building spotted Serna at a window; he displayed his badge, announced that he was a police officer, and requested that Serna come out. Serna withdrew from the window. When Mejia came to the window minutes later, the agent repeated his announcement and request. Mejia also withdrew. Approximately seven to ten minutes after Serna had slammed the door shut, petitioner opened it. The agents immediately arrested petitioner, Serna, and Mejia and entered the apartment to check for other occupants. Inside, the agents observed

white powder in plain view on the kitchen floor, water all over the bathroom floor, a plastic bag in the toilet bowl, large amounts of money in an open safe, a loaded .38 caliber revolver in a hallway closet, a cocaine press in another hallway closet, and, on the bedroom floor, two plastic bags with white residue protruding from the gold shopping bag that Serna had brought to the apartment. The agents subsequently made several warrant-authorized searches of the apartment and seized, *inter alia*, one kilogram of cocaine and various narcotics paraphernalia.

ARGUMENT

Petitioner contends (Pet. 3-6) that the agents' conduct at the door of his apartment, followed by their entry into the apartment and their arrest of petitioner, Serna, and Mejia, violated the Fourth Amendment. All possible questions regarding the propriety of the agents' conduct after they reached petitioner's apartment are highly fact-bound and were correctly resolved against petitioner by the district court and the court of appeals in thoroughly considered opinions. The officers' actions were, at each step, a reasonable response to a rapidly changing and volatile situation. Petitioner raises no substantial legal question regarding the appropriate standards to be applied in reviewing police behavior of the kind at issue here. Further review in this Court is therefore not warranted.

1. As the court of appeals correctly ruled (Pet. App. 7a-9a), the officers reasonably suspected that Serna and Mejia were engaged in criminal activity, and therefore they were justified in attempting to stop Serna as he entered petitioner's apartment. The agents had followed Serna and Mejia as they drove from their East Side apartment to the Upper West Side of Manhattan and then stopped their car at various places in an area known for high narcotics activity. The two suspects' behavior was characteristic of persons engaged in the drug trade. In light of the agents' knowledge

that Mejia was a major wholesale dealer in cocaine and that Serna was probably her partner, the agents' observations on August 15, 1979, provided them with ample reason to believe that Serna and Mejia were engaged in a drug pick-up and delivery. Compare *United States* v. *Cortez*, No. 79-404 (Jan. 21, 1981), slip op. 6.

As the court of appeals also determined (Pet. App. 9a-10a), nothing suggests that the agents artificially delayed stopping Serna until he was about to enter petitioner's apartment, in the hope that, by this ploy, they might obtain entry. Rather, the record shows that the agents refrained from stopping Serna and Mejia until their destination became clear. When the suspects, carrying the shopping bag, entered a building in the Bronx where they did not live, the agents reasonably concluded that a drug delivery was about to occur. By the time the agents gained access to the building and were able to locate Mejia and Serna, Serna was entering petitioner's apartment.

2. When petitioner finally opened the door to his apartment seven to ten minutes after the agents announced their presence and began knocking on the door, the agents had probable cause to arrest the occupants of the apartment. The police did not enter the apartment forcibly. They did not break down the door but rather waited a substantial period of time until petitioner opened the door in response to their knocking. During their wait, the agents heard several sounds from inside the apartment, including voices, persons scurrying about, water flowing through pipes, and the flushing of a toilet. By the time petitioner opened the door, if not before, the agents indisputably possessed probable cause to arrest Serna, Mejia, and petitioner. See Pet. App. 49a n.2 (district court suggests that the agents may have had probable cause to arrest Mejia and Serna as soon as they left the car and carried the shopping bag toward the Bronx apartment building). Compare *Sibron* v. *New York*,

392 U.S. 40, 66-67 (1968); *United States* v. *Vasquez*, 534 F. 2d 1142, 1145 (5th Cir.), cert. denied, 429 U.S. 962 (1976); *United States* v. *Jacquillon*, 469 F. 2d 380, 385 (5th Cir. 1972); *United States* v. *Cisneros*, 448 F. 2d 298, 302-303 (9th Cir. 1971); *United States ex rel. Gary* v. *Follette*, 418 F. 2d 609, 611 (2d Cir. 1969); *United States* v. *Soyka*, 394 F. 2d 433, 453-454 (2d Cir. 1968) (en banc), cert. denied, 393 U.S. 1095 (1969).

The exigencies of the situation required the warrantless entry into petitioner's apartment. See *United States* v. *Santana*, 427 U.S. 38 (1976); *Warden* v. *Hayden*, 387 U.S. 294, 298-300 (1967). Trafficking in controlled substances demands a prompt law enforcement response, especially where the agents involved have a particular reason to believe that the destruction of evidence may be imminent or already in progress. As a general rule, "agents are entitled to use their knowledge that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic * * * ." *United States* v. *Manning*, 448 F. 2d 992, 998-999 (2d Cir.) (*en banc*), cert. denied, 404 U.S. 995 (1971).[3] Here, the agents had seen Serna slam the door in their face, and the occupants of the apartment were unquestionably aware of the police presence outside. The lengthy delay before the door was opened and the noises coming from inside the apartment gave the agents ample grounds

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[3]Accord, *United States* v. *Davis*, 461 F. 2d 1026, 1031-1032 (3d Cir. 1972): "Because of the speed with which narcotics can be dispersed or destroyed, agents must be able to move as quickly as possible. * * * [W]henever the Government attempts to control narcotics and narcotics peddlers, it is dealing with a type of exigent circumstance, the disappearance of evidence or contraband, long recognized as creating an exception to the need for an arrest or search warrant."

for concluding that prompt action was necessary if all the available evidence was not to be concealed or destroyed.[4] See, *e.g.*, *Ker* v. *California*, 374 U.S. 23, 40 (1963); *United States* v. *McLaughlin*, 525 F. 2d 517, 521 (9th Cir. 1975), cert. denied, 427 U.S. 904 (1976); *United States* v. *Bustamante-Gamez*, 488 F. 2d 4, 8 (9th Cir. 1973), cert. denied, 416 U.S. 970 (1974); *United States* v. *Rubin*, 474 F. 2d 262, 268-270 (3d Cir.), cert. denied, 414 U.S. 833 (1973).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

DEBORAH WATSON
Attorney

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[4]The court of appeals expressed concern (Pet. App. 11a) that the agents' initial kicking and banging on the door constituted an "overly enthusiastic attempt" to stop Mejia and Serna. In light of all the circumstances, however, the agents might well have been justified in using force to enter petitioner's apartment immediately after Serna slammed the door. And, in any event, as things actually happened, the kicking and banging did not prejudice petitioner in any way. The agents in fact did not enter the apartment forcibly but waited until petitioner opened the door.